

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Duke Energy Ohio, Inc., for an) Case No. 15-452-GA-RDR
Adjustment to Rider MGP Rates.)

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Tariff) Case No. 15-453-GA-ATA
Approval.)

DIRECT TESTIMONY OF

KEITH BONE

ON BEHALF OF

DUKE ENERGY OHIO, INC.

March 31, 2015

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I. INTRODUCTION AND PURPOSE

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is Keith Bone, and my business address is 550 South Tryon Street,
3 Charlotte, North Carolina 28202.

4 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

5 A. I am employed by Duke Energy Business Services LLC as Director of Insurance
6 & Claims for the Duke Energy Corporation (Duke Energy) enterprise. I am
7 responsible for directing and managing the worldwide insurance operations,
8 claims, and captive insurance company operations for Duke Energy and its
9 affiliated companies, including Duke Energy Ohio, Inc., formerly known as The
10 Cincinnati Gas & Electric Company, Inc. (Duke Energy Ohio or Company).

11 **Q. PLEASE BRIEFLY SUMMARIZE YOUR EDUCATIONAL**
12 **BACKGROUND AND PROFESSIONAL EXPERIENCE.**

13 A. I earned a Bachelor of Science degree in Engineering Operations from North
14 Carolina State University in 1979. I joined Duke Power in 1979 as a buyer for
15 Duke Power's hydroelectric facilities and electric transmission department. Since
16 then, I have assumed positions of increasing responsibility. In 1987, I became
17 Manager of Procurement, and in 1995, I was appointed Manager of Acquisitions
18 and Sales in Duke Power's real estate division. In November 2000, I became
19 Director of Claims, and I assumed my current position in July of 2006.

1 **Q. PLEASE SUMMARIZE YOUR RESPONSIBILITIES AS DIRECTOR OF**
2 **INSURANCE & CLAIMS.**

3 A. As Director of Insurance & Claims, I have been involved in all aspects of
4 insurance procurement and management of insurable risks for Duke Energy since
5 2006. In this regard, I have procured numerous types of policies, including
6 comprehensive general liability, umbrella/excess liability policies, all-risk
7 property damage policies, and a myriad of other types of policies typically
8 obtained by utility companies.

9 With regard to the two manufactured gas plant (sites) that are at issue in
10 these proceedings, I am one of the people responsible for supervising efforts to
11 obtain insurance recovery for the liabilities at those sites.

12 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PUBLIC**
13 **UTILITIES COMMISSION OF OHIO?**

14 A. I have not provided oral testimony before the Public Utilities Commission of Ohio
15 (Commission). However, I have submitted written testimony in Case No. 14-
16 0375-GA-RDR, *et al.*

17 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**

18 A. My direct testimony will describe the steps that Duke Energy Ohio has taken in
19 2014 to comply with the Opinion and Order¹ issued November 13, 2013 to
20 actively pursue collection of remediation costs available under its insurance
21 policies. To better understand these efforts, I will first describe the historical
22 insurance policies that are potentially available to provide coverage for Duke

¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.* (November 13, 2013).

1 Energy Ohio's liability for environmental property damage at and around the
2 former MGP sites known as the East End and West End MGPs located in
3 Cincinnati, Ohio. I will also discuss Duke Energy Ohio's efforts to locate and
4 analyze the potentially applicable coverage and some of the challenges that Duke
5 Energy Ohio must overcome to secure coverage. I will then discuss the efforts
6 undertaken by Duke Energy Ohio in 2014 to obtain recovery under available
7 insurance coverage.

II. COVERAGE AVAILABLE FOR ENVIRONMENTAL PROPERTY DAMAGE

8 **Q. WHAT TYPES OF INSURANCE POLICIES POTENTIALLY AFFORD**
9 **COVERAGE FOR THE COMPANY'S LIABILITIES IN CONNECTION**
10 **WITH THE EAST END AND WEST END MGP SITES?**

11 A. In general, liability policies are intended to provide coverage, subject to their
12 underlying attachment points, policy limits, terms, conditions and exclusions, for
13 all sums that the insured becomes obligated to pay because of liability for bodily
14 injury or property damage during the policy period. For environmental property
15 damage, policyholders typically seek coverage principally from comprehensive
16 general liability or umbrella/excess liability policies purchased prior to 1986.

17 **Q. WHAT IS THE SIGNIFICANCE OF 1986 IN RELATION TO**
18 **ENVIRONMENTAL PROPERTY CLAIMS?**

19 A. In 1986, the insurance industry began to include so-called absolute pollution
20 exclusions in their policies. In addition, many policies issued after 1985 were
21 written on a claims-made basis, rather than on an occurrence basis. Claims-made
22 policies cover only claims first made during the policy period (or any extended

1 reporting period) or claims about which a notice of circumstances was first given
2 to the insurer during the policy period (or any extended reporting period). In
3 contrast, occurrence-based policies afford coverage for liability for property
4 damage taking place during the policy period, regardless of when the claim is first
5 made against the insured, *e.g.*, even if the claim is first made to the insurer
6 decades after the policy period ended. Environmental property damage often
7 occurs over a continuous period of many years, which can trigger many policy
8 periods of previously issued occurrence-based coverage. Accordingly, policies
9 issued prior to 1986 are typically the best source of potential coverage for
10 environmental property damage.

11 **Q. DID THE COMPANY UNDERTAKE A SEARCH FOR INSURANCE**
12 **POLICIES THAT MAY AFFORD COVERAGE FOR THE FORMER MGP**
13 **SITES?**

14 A. Yes, Duke Energy Ohio searched its archives and records for evidence of
15 potentially applicable coverage, including the types of policies described above.
16 It also retained outside coverage counsel, K&L Gates, LLP, to review the
17 Company's insurance files and other sources of available information in an
18 attempt to locate any policies that might provide coverage for the East End and
19 West End sites. In addition, Duke Energy Ohio retained an insurance
20 archaeologist to locate additional evidence of coverage.

1 **Q. DID DUKE ENERGY OHIO AND ITS CONSULTANTS FIND**
2 **POTENTIALLY APPLICABLE COVERAGE?**

3 A. Although the existence of these policies does not guarantee coverage, Duke
4 Energy Ohio and its consultants located additional evidence of general liability
5 policies issued to the Company over the period from 1940 to 1985.

6 **Q. CAN YOU DESCRIBE DUKE ENERGY OHIO'S HISTORICAL**
7 **INSURANCE THAT POTENTIALLY AFFORDS COVERAGE FOR THE**
8 **MGP SITES?**

9 A. These historical liability policies are "occurrence-based" and provide coverage for
10 liability resulting from bodily injury or property damage taking place during the
11 policy period that was caused by an "occurrence." In these policies, an
12 occurrence is often defined with language to the effect as follows: "an accident,
13 or an event or continuous or repeated exposure to conditions which results in
14 bodily injury, personal injury, or property damage that is neither expected nor
15 intended from the standpoint of the insured," and all damages arising out of such
16 exposure to substantially the same general conditions shall be considered as
17 arising out of one occurrence. Thus, subject to, and potentially limited by, the
18 terms, conditions, exclusions, and underlying attachment points, the policies
19 provide coverage for sums that the policyholder incurs for liabilities arising from
20 property damage that occurred during the policy periods, up to the limits of the
21 policies. As is the case with many other gas utilities, Duke Energy Ohio did not
22 purchase primary policies that afford first-dollar coverage. Rather, the policies

1 that Duke Energy Ohio purchased are excess policies that attach above self-
2 insured retentions, which act like deductibles.

3 **Q. HOW MANY GENERAL LIABILITY POLICIES DID DUKE ENERGY**
4 **OHIO PURCHASE COVERING THE PERIOD BETWEEN 1940 AND**
5 **1985?**

6 A. Duke Energy Ohio purchased approximately 100 policies covering this period.
7 However, a number of the insurers that issued policies during this period are now
8 insolvent, and it is unlikely that Duke Energy Ohio will be able to recover under
9 those insolvent policies.

10 **Q. ARE THE POLICIES ISSUED BY THE SOLVENT INSURERS IN THE**
11 **HISTORICAL PROGRAM A SOURCE OF POTENTIAL INSURANCE**
12 **RECOVERY FOR THE MGP SITES?**

13 A. Yes. However, as discussed below, and as they generally do in response to
14 environmental claims, the insurers are resisting providing coverage.

15 **Q. WHAT ARE THE CHALLENGES TO OBTAINING COVERAGE FOR**
16 **THESE LIABILITIES?**

17 A. The insurers have reserved their purported rights to deny coverage based on a
18 number of policy terms, conditions, exclusions, and defenses, including (but not
19 limited to) the following assertions (which Duke Energy Ohio contests):

- 20 • the Company allegedly provided late or insufficient notice to the insurers
21 of the liabilities at the MGP sites;
- 22 • the losses allegedly do not arise from an “Occurrence” or “Accident”;

- 1 • the Company allegedly “expected or intended” the property damage at
- 2 issue;
- 3 • the losses allegedly arise from a known loss;
- 4 • the amounts incurred to investigate and remediate property damage
- 5 allegedly are not “damages” within the meaning of the policies;
- 6 • the Company allegedly is not “legally obligated to pay” amounts to
- 7 address property damage;
- 8 • the Company allegedly incurred costs without the insurers’ consent;
- 9 • the Company allegedly failed to cooperate with the insurers;
- 10 • the losses allegedly are barred by owned property exclusions in the
- 11 policies; and
- 12 • the losses allegedly are barred by qualified pollution exclusions in certain
- 13 policies.

14 Duke Energy Ohio has counter-arguments to these defenses. However, a number
15 of Duke Energy Ohio’s insurers are resisting providing coverage, as they typically
16 do when asked to provide coverage for environmental damage at former MGP
17 sites.

18 **Q. PLEASE DISCUSS THE EFFORTS UNDERTAKEN BY DUKE ENERGY**
19 **OHIO IN 2014 TO OBTAIN INSURANCE COVERAGE FOR THESE**
20 **SITES.**

21 A. Duke Energy Ohio took the following steps during 2014 to obtain insurance
22 coverage:

- 1 • conducted an informational meeting for its historical insurers on March
- 2 18, 2014 in Charlotte, North Carolina for purposes of providing additional
- 3 information regarding the East End and West End sites;
- 4 • conducted another informational meeting for its historical insurers on
- 5 October 29, 2014, to provide additional information relating to the sites;
- 6 • responded to informational requests from the insurers throughout the year;
- 7 and
- 8 • in mid-December 2014, made formal demands for settlement of its claims
- 9 for insurance coverage from the key historical liability insurers.

10 **Q. WHY HASN'T DUKE ENERGY OHIO FILED A LAWSUIT AGAINST**
11 **ITS INSURERS TO RECOVER INSURANCE PROCEEDS?**

12 A. Duke Energy would prefer to attempt to reach amicable settlements with its
13 historical insurers if possible. If this result can be achieved, Duke Energy Ohio
14 may be able to avoid the costs of expensive and lengthy litigation against the
15 several carriers. The steps that Duke Energy Ohio has taken and intends to take --
16 providing information to the insurers regarding the sites, responding to reasonable
17 questions and entering into settlement negotiations -- are all reasonable and
18 necessary to achieving this possible goal.

III. CONCLUSION

19 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

20 A. Yes.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/31/2015 4:00:50 PM

in

Case No(s). 15-0452-GA-RDR, 15-0453-GA-ATA

Summary: Testimony Direct Testimony of Keith Bone on Behalf of Duke Energy Ohio, Inc. electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Kingery, Jeanne W. and Watts, Elizabeth H.